E. I. Du Pont de Nemours and Company *and* International Chemical Workers Union, Local 527, AFL-CIO. Cases 22-CA-9926 and 22-CA-10479

January 25, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 11, 1981, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent E. I. Du Pont de Nemours and Company, Parlin, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified herein.

1. Substitute the following for paragraph 2(a):

"(a) Rescind and expunge from the personnel file the written reprimand issued to Isaac Samuels on October 24, 1980."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT change the holiday provisions of our contract with Local 527 International Chemical Workers Union, AFL-CIO, during the term of that contract by granting and scheduling an extra holiday, unless and until Local 527 has first given its approval.

WE WILL NOT conduct investigatory interviews with any employee without the presence of a union steward where that employee reasonably believes that the interview would lead to discipline and has requested that a union steward be present.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees respecting their rights under Section 7 of the Act.

WE WILL rescind and expunge the written reprimand issued to Isaac Samuels on October 24, 1980, because it was the result of an unlawful investigatory interview with him.

E. I. DU PONT DE NEMOURS AND COMPANY

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: On April 24, 1980, International Chemical Workers Union, Local 527, AFL-CIO (herein called the Union), filed the charge in Case 22-CA-9926 alleging that E. I. Du Pont de Nemours and Company (herein called Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (herein called the Act). On December 4, 1980, the Union filed the charge in Case 22-CA-10479 alleging that Respondent violated Section 8(a)(1) of the Act by having engaged in certain conduct, specified below, towards employee Isaac Samuels. On January 30, 1981, the General Counsel of the National Labor Relations Board issued an order consolidating those cases, a complaint and notice of hearing. On February 10, 1981, Respondent filed its answer to that complaint. The hearing was held before me in Newark, New Jersey, on March 9, 1981.

The issues raised by the pleadings and as articulared at the hearing by respective counsel are:

1. Whether Respondent, in violation of Section 8(a)(1) and (5) of the Act, established another holiday for employees represented by the Union during the term of the contract covering them without having obtained the Union's consent.

2. Whether Respondent, in violation of Section 8(a)(1) and (5) of the Act, changed established grievance procedures by having refused the Union's request to use a telephone during a grievance meeting and by having refused the Union the opportunity for a recess at that meeting.

3. Whether Respondent, in violation of Section 8(a)(1) of the Act, conducted an investigatory interview with employee Isaac Samuels on October 24, 1980, and thereafter disciplined him as a result of that interview, not-

withstanding that that employee had requested to be represented by the Union at that interview and that he reasonably believed that the interview would result in disciplinary action.

Upon the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent makes photographic materials at its Parlin, New Jersey, plant. The Union represents a unit of "wage roll employees including all hourly paid production, maintenance, laboratory and clerical employees employed by (Respondent there) but excluding all salary employees, watchmen, guards, professional employees, and all supervisory employees." A contract covering that unit of employees had been in effect from September 26, 1978, to September 23, 1980; the current contract is effective from September 24, 1980, to September 24, 1982. The negotiations between the Respondent and the Union which led up to agreement on the terms of both the 1978–80 contract and the current 1980–82 contract bear on the question as to whether Respondent unlawfully put into effect a new paid holiday.

B. *The Holiday Issue*

1. The negotiations

In the course of the negotiations leading up to the 1978–80 contract, the Union had sought to increase the number of paid holidays from a total of 10 a year to a total of 12. Its efforts thereon were not successful. Art. VI, section 1 of the 1978–80 contract listed ten paid holidays. That agreement was signed on January 15, 1979.

On November 13, 1979, Respondent proposed increasing the number of paid holidays from 10 to 11. The Union asked why Respondent had not countered with an offer of one extra paid holiday to the Union's demand in 1978 for two such holidays. Respondent replied that an extra holiday was not "timely" in 1978 but that it was in late 1979, and that Respondent was offering an extra holiday in order to remain competitive in being able to attract a competent work force and to retain it. Instead of accepting Respondent's offer, the Union submitted a counterproposal, i.e.—that Respondent fund a drug prescription plan with the moneys it would have spent to pay the unit employees for the extra holiday. The Union's counterproposal was discussed at negotiating sessions on December 17, 1979, and January 21, 1980. On the latter day, Respondent advised that it rejected the counterproposal and stated that it was interested only in providing an extra holiday. It appears that, sometime before the next meeting was held on the holiday issue, as discussed below, Respondent notified its salaried employees (who are excluded from the unit represented by the Union) that they would receive an extra holiday, in addition to the 10 they then received.

On January 24, 1980, the Union's representatives, at another negotiating session, advised Respondent that the Union considered it unfair for Respondent to have notified its salaried employees that they would receive an extra holiday when no agreement thereon was reached by Respondent and the Union. The Union also advised Respondent that, while the unit employees preferred a drug prescription plan, the Union was prepared to go along with the extra holiday. The Union offered Respondent four alternate days on which it was prepared to reach agreement. These days, listed in the order of the Union's stated preference, were: (1) the date on which an employee celebrates his or her birthday, (2) the day after Christmas, (3) the day before New Year's Day, or (4) Veteran's Day.

On February 4, 1980, Respondent advised the Union that it rejected the four alternatives offered by the Union. Its representative explained that granting an extra holiday on an employee's birthday could be too difficult to administer, that there would be too many holidays in the yearend period if the extra holiday were scheduled for the day after Christmas or the day before New Year's Day and that not many of the salaried employees favored Veteran's Day as the day for the extra holiday. Respondent advised that most of the salaried employees favored scheduling the extra holiday on the Friday before Labor Day. At another negotiating session on February 18, 1980, the Union advised that it was not interested in having the extra holiday on the Friday before Labor Day. On February 27, 1980, the Union offered to accept that day provided that Respondent would agree that in 1981 and each year thereafter, the extra holiday would be a "floating" holiday, i.e.—one that would be mutually determined by the Union and Respondent in each of those years. Respondent stated then that it was not interested in a floating holiday.

On March 17, 1980, the Union offered another counterproposal respecting the day on which the extra holiday would be held. It offered to hold the holiday on the last Friday in July or the first Friday in August and stated that either of those days would "break up the summer." Respondent rejected that proposal and advised them that there was no point in discussing alternate days as Respondent, based on "administrative necessity," was going to hold the extra holiday on the Friday before Labor Day. The union representatives caucused and then told Respondent's representatives that the Union refused to accept that day as the date for the 11th holiday.

On March 18, 1980, Respondent distributed a four-page circular to its employees at its Parlin plant, which reported on safety awards, organization changes, new employees, and other matters. One of those other matters concerned the extra holiday issue and was reported as follows:

> At the March 17th—Union/Management Meeting the following items were discussed.
>
> *11th Holiday*
>
> The Friday before Labor Day has been established as the date to celebrate the eleventh Holiday.
>
> The Holiday was originally offered in mid-November 1979. Since that time we have met with the Union frequently and considered a variety of dates suggested. It was a topic again at the Union/Management Meeting on 3/17/80, and the Union is still in disagreement, however, we pointed out we are already three months into 1980 and need to get plans for the Holiday started. Efficient business scheduling and general employee appeal were considered in selecting the day.
>
> Two additional requests were made by the Union at the meeting (3/17/80), which were the first Friday in August or the last Friday in July. These choices were rejected as not having appeal different than those already discussed.
>
> The Holiday will be celebrated each year on the Friday before Labor Day.

In July 1980, negotiations began with respect to the terms and conditions of a contract to succeed the 1978–80 contract, then scheduled to expire on September 23, 1980. At the outset of those contract renewal negotiations, Respondent listed the extra holiday among the "housekeeping" items to be cleared up before discussions on the terms of a renewal contract got underway. Housekeeping items are those matters on which agreement had been reached between the parties in the period between the execution of the 1978–80 contract and the start of the negotiations for a renewal contract. The Union objected to the inclusion of the extra holiday as a "housekeeping" item and it was removed from that category. Thereafter, Respondent's representative endeavored, on about four occasions, to discuss the matter of the extra holiday with the Union but was advised that the matter was out of the Union's hands—a reference apparently to the notice Respondent issued to employees on March 18, 1980, that the extra holiday will be celebrated each year on the Friday before Labor Day. The current contract, 1980–82, lists 11 paid holidays—one of them is the Friday before Labor Day. That contract was signed on February 2, 1981.

On August 29, 1980, the Parlin plant was closed down. All employees—wage roll and salaried employees—received it as a paid holiday.

2. Analysis

The undisputed evidence is that the 1978–80 contract contained ten specific holiday dates; that the Union had been unsuccessful during the negotiations leading up to that contract to persuade Respondent to increase that number to 12; that during the term of the 1978–80 contract the Union implicitly agreed to add a holiday to the total of ten contained in that contract; that the Union never agreed during the term of that contract as to the day when the holiday would be held and had vainly offered alternate proposals; that Respondent advised all its employees at Parlin on March 18, 1980, that the extra holiday would be held on August 29, 1980, and on the Friday before Labor in each year thereafter; that the Union notified Respondent that it refused to accept that day as the date for the 11th holiday; that the Union objected to Respondent's attempt to include the Friday after Labor Day date as an agreed on holiday under "housekeeping items" in the renewal contract negotiations; that Respondent then withdrew that holiday date as an item on which agreement had been reached; that August 29, 1980, was a paid holiday for all employees; and that the Friday after Labor Day is among the holidays in the current contract.

It is the General Counsel's contention that the foregoing facts establish that Respondent, on March 18, 1980, unilaterally added the day after Labor Day as a holiday to those listed in the contract in effect as of that date. Respondent asserts that it did not make a unilateral change in the holiday provisions of that contract as (a) the Union had agreed to add an 11th holiday to that contract, (b) the Union is estopped from asserting that it had not agreed also that that holiday would be celebrated on the day after Labor Day, and (c) the holiday became effective after the Union had reopened the contract and such a modification was permissible under the provisions of Section 8(d) of the Act.

Section 8(d) of the Act and clear case law prohibit unilateral midterm contract modifications.[1] The undisputed facts establish that, while the parties had agreed that there would be an extra holiday, there was no agreement during the contract term as to when the holiday would be held. In view of this and as the then existing contract specified not only the agreed on holidays but the dates on which they would be celebrated,[2] it is axiomatic that Respondent's implementation of the August 29 date for the extra holiday violated Section 8(a)(1) and (5) of the Act.[3] Respondent's estoppel argument is premised on its view that the Union did not "formally object"[4] to the implementation of the 11th holiday but instead allowed its members to celebrate it. The General Counsel has observed in his brief that Respondent's tactics were designed to undermine the support given the Union by the employees in the unit it represents. It seems to me that Respondent did place the Union in a quandary. On the one hand, the Union could not have insisted that Respondent withdraw its plan to give gratuitously all em-

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[1] *Oak Cliff-Golman Baking Company*, 202 NLRB 614 (1973).

[2] One of the holidays set out in the 1978–80 contract was identified as the "Friday following Thanskgiving Day."

[3] *C & S Industries, Inc.*, 158 NLRB 454, 457 (1966).

[4] I infer that Respondent would require the Union to have served it with a written request not to implement the 11th holiday to be a method whereby the Union could be said to have "formally" objected to the change; in its brief Respondent indicates that a formal grievance would have been another suitable method of the Union's voicing its objection. Also in its brief Respondent alludes to a colloquy between myself and the Union's vice president respecting whether the Union notified Respondent that it did not want the holiday to be put into effect. Of greater significance is the uncontroverted evidence that Respondent withdrew the scheduling of the 11th holiday from the list of "housekeeping" items when the parties were clearing the bargaining table at the outset of the renewal contract discussions. In effect Respondent thereby conceded that agreement had not been reached.

ployees an extra day off with pay, unless the Union was ready to risk being ousted by the employees as their representative. On the other hand, the Union could not assent to Respondent's plan after Respondent had rejected all of the Union's prior proposals, unless the Union was ready to concede that there is no way an employer can be stopped from unilaterally putting a benefit into effect during a contract term. The way out of this quandary, it seems to me, is the one followed by the Union—to voice dissent and seek relief under the Act to bar a repetition of such conduct.

Respondent separately urges that it was lawful for it to close its Parlin plant on August 29, 1980, as a holiday as such a "modification" is permissible under Section 8(d) once the Union, as it did, reopened the 1978–80 contract for renewal negotiations. Respondent acknowledges in its brief that it offers this view as its construction of Section 8(d) and that it can find no case law to support that view. The cases cited at footnotes 1 and 3, *supra*, seem to be dispositive of the merits of that view as the principle enunciated in those cases encompasses the argument submitted by Respondent. Further, were merit to be found in Respondent's contention as to its interpretation of Section 8(d), the language of that section would encourage unilateral modification during the insulated period of an expiring contract. Such a construction would promote industrial strife, hardly the aim of Section 8(d). Finally, I find merit in the argument expressed by the General Counsel in its brief. There, he notes that, in any event, the modification occurred on March 18, 1980, a date well before the Union served the notices to negotiate a renewal contract.

C. Alleged Refusal To Permit Union To Use Telephone or To Caucus as Unilateral Changes in Procedures Governing Grievance Meetings

The General Counsel asserts that Respondent violated Section 8(a)(1) and (5) of the Act by having unilaterally changed grievance meeting procedures on April 23, 1980, when it refused to permit union representatives to use a telephone in order to make an inquiry to obtain information related to a grievance under discussion then. Respondent contends that the Union's request was in connection with an issue not relevant to that grievance. Respondent's view is that enough time had been spent discussing the merits of the grievance itself and that it did not desire to waste time by engaging in collateral discussion. The essential facts do not appear to be in dispute.

On April 23, 1980, the parties were involved in a third-step grievance meeting pertaining to whether: (1) Respondent had a contractual right to combine two crews into one, (2) the employees affected by the change were accorded their contractual rights, and (3) certain employees whose duties had changed should continue to receive the higher of a two-tier wage rate. In discussing the third aspect of that grievance, the following matters surfaced. Prior to the integration of the crews, certain operators had performed higher rated work and received a corresponding wage rate; lesser skilled operators earned less. When the crews were combined, the skilled operators were required at times to perform less skilled work. Respondent took the position at the April 23, 1980, session that the skilled operators would receive the higher rate only when performing the more skilled functions; the Union contended that those skilled operators should get the higher rate at all times, even when they were assigned to less skilled work. After the parties discussed the matter for some time, the Union's president asked in essence whether an employee who substituted for an operator receiving the higher rate would receive that higher rate even when performing work normally paid at the lower rate and he observed that, several years previously, in a similar case, Respondent had agreed that the substitute employee should get the higher rate. Respondent's representative at this April 23, 1980, meeting acknowledged that that same principle should apply when the substitute is doing the more skilled work but he continued to assert that a two-tier wage rate would be followed with operators to be paid the higher rate when doing skilled work and the lower rate for the less skilled work. At that point, the Union's president sought to use the telephone. When asked by Respondent why he wanted to use the telephone, the Union's president advised that it was necessary to do so but refused to specify a reason other than state that it sought information to confirm the resolution of the earlier grievance similar to the one under discussion. Respondent's representative refused to permit him to do so. It appears that the parties had been discussing the grievance for about an hour as of that point. The Union's witnesses testified that they intended to call Respondent's superintendent of labor relations to review the grievance he settled several years previously as, in the Union's view, that settlement was a binding precedent. Respondent contends that no useful purpose would have been served by the Union's confirming what Respondent had already been conceded particularly as that point had no bearing on the issue than in dispute. The Union's president also had asked at the April 23, 1980, meeting to use the pay telephone outside. Respondent denied this request and stated that, if the Union developed any pertinent information later, Respondent would be willing to reconvene the third step grievance meeting to consider any new data. The meeting ended with Respondent's denial of the grievance in its entirety. That grievance has not been taken to arbitration as of the date of the hearing in the instant case.

The General Counsel adduced testimony that that was the first time in the numerous grievance meetings held between Respondent and the Union that the Union's representatives were denied access to a telephone to obtain data it deemed necessary to aid it in processing a grievance. Respondent's area supervisor testified that he has represented Respondent at the third-step grievance level on or about 12 occasions and never had received a request from the Union to use a telephone at any one of those meetings, other than the one held on April 23, 1980.

The General Counsel's contention is that Respondent was obligated to honor the Union's request to use the telephone in connection with the grievance under consideration then as it had always done so in the past. The General Counsel views as irrelevant that (a) the griev-

ance had been under discussion for an hour, (b) Respondent had clearly informed the Union that it would reconvene the meeting at the Union's request if it so desired, and (c) the matter about which the Union had sought to use the telephone appeared to Respondent to be irrelevant to the issue under discussion. Such a construction of the good-faith bargaining requirements of Section 8(d) of the Act respecting unilateral changes unduly emphasizes rigid procedural formalities. Good-faith bargaining does not require a party to stand by while the other side pursues an inquiry with someone outside of those present on an apparently irrelevant point, notwithstanding that a considerable time had already been spent discussing the merits of the grievance itself. Good-faith bargaining would seem to require a party to be willing to meet again to discuss the matters developed by that inquiry if they proved significant. It is evident to me that Respondent's actions in the April 23, 1980, grievance discussions were in accord with those considerations of good-faith bargaining. All of the relevant circumstances must be considered in determining whether an employer's denial of a request respecting the utilization of the grievance machinery violates Section 8(a)(1) and (5).[5] The evidence in the instant case fails to establish that Respondent's unwillingness to allow the Union access to its telephone or to agree to a short recess on April 23, 1980, constituted a violation of the Act, especially as the testimony discloses that Respondent had indicated its willingness to reconvene the grievance meeting to consider any new points the Union might wish to present.

D. *The Weingarten Issue*[6]

1. The different factual accounts

In the latter part of 1980, Respondent scheduled weekend overtime work at Parlin Plant due to increased orders. On various occasions at that time, one of the unit employees there, Isaac Samuels, declined to work on weekends. In late October 1980, Samuels advised his supervisor that he would not work scheduled overtime on the coming weekend. On October 23, 1980, he was informed that, if he failed to report to work on the Saturday of that week, he would be considered AWOL and that that could lead to his discharge. The *Weingarten* violation allegedly occurred on October 24, 1980.

Samuels testified as follows as to the events on October 24. His supervisor, Raymond Zera, told him that he wanted to talk to him about overtime and that he, Samuels, then requested Zera to call a shop steward to be with him. Zera told him that he did not need a steward but, when Samuels insisted, Zera tried by telephone without success to locate one. Zera then informed Samuels that the steward was out to lunch, and Zera again stated to Samuels that he did not need a steward. Samuels insisted on a steward being present and again Zera told him one was not needed. At this point, he told Zera that Zera is after all trying to "stick it up [Samuels'] ass" while saying at the same time that he does not need a shop steward. Zera told him then to get into the office where he waited while Zera left and returned with Respondent's area supervisor, Kerry Quackenbush. Quackenbush told Samuels that he was not going to put up with Samuels' abusing his foreman by calling him an "asshole." Samuels told Quackenbush that he did not call Zera an asshole. Quackenbush told Samuels to go back to work and that he would get back to Samuels later about the matter. Shortly thereafter, Samuels was ordered to report to Zera's office where Zera handed Samuels a typewritten sheet with the heading, "Written Reprimand" on it. Therein, Zera wrote that (a) he had informed Samuels earlier that day that if he intended to be excused from weekend overtime because of illness, he should make sure to bring in a doctor's note to verify his illness, (b) Samuels had responded then that he would not work weekend overtime and would not claim illness, and (c) Samuels had then called Zera "an asshole" and, when asked to repeat it, Samuels again called Zera an "asshole." The Union's steward, who was also present in Zera's office then, asked Samuels if it were true that he called Zera an "asshole" and Samuels said it was not. The steward asked Zera if there were any witnesses. Zera responded that there were none and Zera then said that Samuels had just admitted that he had called him, Zera, an "asshole". Samuels then told his steward to make a note of the fact that Zera has bad hearing as he was sitting only 3 feet away and did not hear Samuels deny that he called Zera an "asshole".

Zera's account of the October 24 incident is as follows. He approached Samuels and said he would like to have a word with him. Samuels said he wanted a steward present. Zera replied that none was needed as the discussion was purely informative. Zera had no intention of talking about discipline but merely intended to tell Samuels that if he planned to report off sick instead of working the assigned weekend overtime, he must bring in a doctor's note. Zera then so informed Samuels who then said that Zera intended to fire him. At that point, Samuels started to walk away. Zera heard him say "asshole" and then questioned Samuels as to what he had said. Samuels turned and said directly to Zera that he "is an asshole." Zera then ordered Samuels to wait. The rest of Zera's account parallels Samuels' version. Zera conceded that he erroneously thought that Samuels, in the subsequent meeting in his office with the Union's steward present, admitted calling Zera an asshole and that in fact Samuels had denied doing so.

I credit Samuels' account as to the events on October 24. Zera did not deny trying without success to locate the steward on the telephone; he testified in a conclusionary manner that he had told Samuels what he intended to tell him; he testified that Samuels was walking away from him when he uttered the word "asshole" and that it was only when Zera questioned him did he hear Samuels tell him that he, Zera, was an "asshole" the account Zera set out in the October 24 "Written Reprimand" as to what Samuels had said differs somewhat from Zera's testimony at the hearing; and, most signifi-

[5] Cf. *American Ship Building Company*, 240 NLRB 1, 17-18 (1979). The cases relied on by the General Counsel in his brief to me are readily distinguishable from the instant cases, on the facts.

[6] This refers to the matters considered in *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

cantly, Zera admits that he misunderstood Samuels when Samuels, in the presence of a union steward, denied calling him an "asshole" despite the fact that Samuels was then facing him and was only a few feet from him and whereas, when the incident occurred, Zera said Samuels was walking away from him.

Samuels had filed a grievance respecting the written reprimand issued him on October 24. It was pursued through the preliminary steps but was withdrawn by the Union prior to arbitration. Samuels was later discharged apparently on the basis of events that occurred after October 24 and has filed a grievance thereon. That grievance is being pursued.

2. Analysis

It is settled law that an employer violates Section 8(a)(1) of the Act by conducting an investigatory interview with an employee after having denied that employee's request for representation by his union steward and where that employee reasonably believed that the interview may lead to disciplinary action. The General Counsel contends that the written reprimand issued Samuels on October 24 was the result of Zera's having conducted an investigatory interview with him on that date without the presence of a requested steward and notwithstanding that Samuels then had reasonably believed that the discussion with Zera would lead to discipline against him. Respondent asserts that Zera did not conduct an investigatory interview with Samuels on October 24; that Zera did not deny Samuels' request for representation; that Samuels had no reasonable basis to believe that Zera's discussion with him could result in discipline and that Samuels was not in fact disciplined as a result of information obtained in that discussion. There is no contention that Samuels was disciplined; because he sought union representation or because he was otherwise engaged in protected activity. The issue framed by the pleadings is purely a *Weingarten* one and, as expressed by the parties before me, is one which essentially requires factual resolutions—whether Samuels reasonably feared the prospect of discipline, whether Zera did in fact conduct an investigatory interview, and so on.

Respondent states that Samuels could have no reasonable basis to fear being disciplined in view of the assurances Zera gave him. The credited evidence establishes that Zera told Samuels that he did not need a steward. Zera's actions, however, belied his very words as he made efforts to locate Samuels' steward. That, in context with the prior warnings given Samuels, makes it obvious to me that Samuels reasonably feared discipline may result from discussing, with Zera on October 24, the matter of weekend overtime assignments. In any event, Zera's statement that Samuels did not need a steward is not a sufficient basis to disregard Samuels' request.[7]

The next question is raised by the contention of Respondent that no investigatory interview took place on October 24, 1980. Respondent notes that, although Zera intended to talk to Samuels respecting his oft-stated refusal to work weekend overtime, Zera in fact did not question him thereon. That argument seems to me to emphasize style over substance. Respondent urges that Zera sought only to warn Samuels that he better have a doctor's note if he claimed illness as the reason for not working the scheduled weekend overtime. Implicit in such a warning, and for that matter in Zera's persistence in talking to Samuels on October 24 after the representation request was made, is an inquiry by Zera of Samuels as to whether or not he still intended to go through with his intention of refusing to work weekend overtime, despite the fact that he had been given a written warning thereon the previous day. Samuels recognized that point instinctively when he complained that Zera was trying to stick it to him while telling him at the same time that he did not need a steward. I thus conclude that Respondent did conduct an investigatory interview that day with Samuels despite repeated requests for a shop steward. Respondent thereby violated Section 8(a)(1) of the Act.[8]

Lastly, Respondent contends that the discipline meted out to Samuels on October 24 was unrelated to any information elicited from Samuels that day. That contention goes to the scope of the remedy to be provided as all the essential elements of a *Weingarten* violation have been established. The short answer to Respondent's contention is that *Weingarten* expressly recognizes that an employee may be too fearful or inarticulate, when alone, to participate intelligently in an investigatory interview and that the presence of a union representative may prevent needless hard feelings from arising. It seems obvious to me, and I thus conclude that the discipline meted out to Samuels was an outgrowth of the unlawful interview. In the *Weingarten* case itself, the information that gave rise to the ultimate filing of the unfair labor practice charge was volunteered by the employee and was collateral to the investigation itself. To provide an appropriate remedy, I shall recommend that Respondent rescind the October 24 "Written Reprimand."

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and

[7] *Lennox Industries, Inc.*, 244 NLRB 607 (1979)

[8] Cf. *AAA Equipment Service Company*, 238 NLRB 390 (1978). Respondent cites the Board's holding in *Chrysler Corporation, Hamtranck Assembly Plant*, 241 NLRB 1059 (1979), and cases discussed therein as support for its contention that it did not conduct an investigatory interview on October 24. That case does not stand for any conclusive presumption which would obviate a need for me to make a factual determination. At best, the facts in *Chrysler* are somewhat analogous to those in the instant case. On the critical point, however, those facts are readily distinguishable. In *Chrysler*, the meeting had ended and then the employee began an altercation. In the instant case, Zera was endeavoring to persuade Samuels to forgo union representation with respect to whether Samuels would use illness as an excuse to evade weekend overtime and then disciplined Samuels because he misunderstood Samuels response. Thus, Zera had continued the investigatory interview and disciplined Samuels for refusing to cooperate. I view the facts in *Chrysler* and those of the cases cited therein (e.g., *Amoco Oil Company*, 238 NLRB 551 (1978)), as not controlling and, on the basic issue, inapposite.

(5) of the Act by having, since on or about March 18, 1980, designated August 29, 1980, and the Friday before Labor Day in each succeeding year as an extra holiday for all wage roll employees employed at its Parlin, New Jersey, plant notwithstanding that such designation changed the holiday provisions of the then existing contract between Respondent and the Union and notwithstanding that the Union had not assented thereto.

4. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act by having conducted an investigatory interview with its employee, Isaac Samuels, on October 24, 1980, and disciplined him for statements it concluded he made then, without having afforded him union representation as had been requested by him and notwithstanding that he reasonably believed that the investigation would lead to discipline against him.

5. Respondent did not violate Section 8(a)(1) and (5) of the Act by having refused to permit the Union to use a telephone during a grievance meeting on April 23, 1980, or by having refused to honor the Union's request for a brief recess at that meeting.

6. The activities of Respondent as found above in paragraphs 3 and 4, occurring in connection with its operations as described in paragraph 1, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

The Respondent, E. I. Du Pont de Nemours and Company, Parlin, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the International Chemical Workers Union, Local 527, AFL-CIO (herein the Union), by changing, during the term of a collective-bargaining agreement it has with the Union for its wage roll employees at Parlin, New Jersey, the holiday provisions of that contract without having first obtained from the Union its assent to such change.

(b) Conducting an investigatory interview of any wage roll employee at its Parlin, New Jersey, plant without the presence of a union steward where the employee has requested the presence of such steward and where that employee reasonably believes that the interview would lead to disciplinary action against him, or to the imposition of discipline as a result of matters arising out of such an investigatory interview.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind the written reprimand issued to Isaac Samuels on October 24, 1980.

(b) Post at its Parlin, New Jersey, plant copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegation that Respondent violated Section 8(a)(1) and (5) of the Act by having refused to permit the Union to use a telephone during a grievance meeting on April 23, 1980, and by having refused to agree to the Union's request for a short recess during that meeting shall be, and hereby is, dismissed.

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."